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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 497

THE BORDEN COMPANY, SAFEWAY STORES, INC., L. D. SCHREIBER & CO., L. D. SCHREIBER CHEESE CO., HAYSSEN MANUFACTURING COMPANY, FRIGO BROTHERS CHEESE CORPORATION, and CONCORD CHEESE CORPORATION, *Petitioners,*

vs.

NATIONAL DAIRY PRODUCTS CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, The Borden Company (Borden), Safeway Stores, Inc. (Safeway), L. D. Schreiber & Co., (Schreiber), L. D. Schreiber Cheese Co. (Schreiber Cheese), Hayssen Manufacturing Company (Hayssen), Frigo Brothers Cheese Corporation (Frigo), and Concord Cheese Corporation (Concord), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 26, 1968.

OPINIONS BELOW.

The opinion of the District Court containing findings of fact and conclusions of law (I. 121-146),* Appendix A hereto, is reported at 261 F. Supp. 771. The opinion of the United States Court of Appeals for the Seventh Circuit, Appendix B hereto, is reported at 394 F. 2d 887.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 26, 1968. The Petition for Rehearing filed by Borden and joined in by Schreiber and Schreiber Cheese and the Petition for Rehearing and/or for Clarification of Decision filed on behalf of Safeway, Hayssen, Frigo and Concord were denied on June 12, 1968, by the Court of Appeals for the Seventh Circuit. The Jurisdiction of this Court is based upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether in reversing the District Court on the issue of patent validity, the Court of Appeals decided a Federal question in a way in conflict with the applicable decisions of this Court, particularly the requirements of *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966), and in conflict with Section 103, Title 35, U. S. C.

2. Whether in reversing the District Court on the issue of patent validity, the Court of Appeals violated Federal Rule of Civil Procedure 52 (a) and arbitrarily departed from the accepted and usual course of appellate procedure by:

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*In this petition, reference to the joint appendix in the Court of Appeals filed as a part of the record herein will be by volume and page, *i.e.*, (I. ....). References to the Appendices to this petition will be by letter designation and page *i.e.* A-..., B-... etc.

(a) Rejecting the District Court's fully supported finding of fact on the level of ordinary skill in the prior art and ignoring the finding of fact on the scope and content of that art; and

(b) Substituting certain "facts" for opposite critical findings of fact which were made by the District Court and fully supported by the evidence.

STATUTES INVOLVED.

The statutory provisions involved are Rule 52 (a) of the Federal Rules of Civil Procedure, Title 28, U. S. C., and Sections 102 and 103, Title 35, U. S. C. These statutes are set forth in Appendix C hereto.

STATEMENT OF THE CASE.

These actions were brought under the Patent Laws of the United States by National Dairy Products Corporation (National Dairy) and, in their present posture involve only the question of the validity of Patent No. 2,919,990 (referred to as the Podlesak patent) issued January 5, 1960, from an application filed June 22, 1955. The Podlesak patent, entitled "Method of Continuously Producing Packaged Units", relates to a method for wrapping an article in a sealable flexible sheet material in a preservative atmosphere.

National Dairy is the successor of Kraft Foods Company (Kraft) by merger and Kraft is now a division of National Dairy. Commencing in May, 1962, National Dairy filed separate actions against many of the country's leading cheese packagers, including Borden, Safeway, Frigo, Schreiber, Schreiber Cheese, and Concord claiming infringement of the Podlesak patent. In each of the actions, National Dairy joined as defendant Hayssen, the manufac-

turer of the machine which National Dairy alleges was used to infringe the Podlesak patent. The five separate lawsuits involving the above named companies were consolidated for trial, solely on the issue of validity, in the Eastern District of Wisconsin, and the cases were tried solely on that issue. The issue of infringement has not been tried. Actions are presently pending in the Western District of Wisconsin against other cheese packagers and Hayssen which have not as yet been tried either on the issue of validity of the Podlesak patent or the infringement thereof.

Evidence before the District Court included proof of the use during the period 1950 to 1954, before the alleged Podlesak invention, of a method of packaging cheese at the Swift-Pauly plant in Green Bay, Wisconsin. (Finding 4, Appendix D.) The District Court made extensive findings as to this use and related it to other findings on the scope and content of the prior art. (Findings 5 through 18, Appendix D.)

Conceding that the question of anticipation (35 U. S. C. 102) was close (Finding 10, Appendix D), despite the finding that the literal language of the claims of Podlesak may be read on the gas flushing portion of the Swift-Pauly operations (Finding 14, Appendix D), the District Court held that the patent was not invalid under Section 102. However, the District Court held that the patent was invalid for obviousness under Section 103. The District Court did not limit its inquiry to the Swift-Pauly use but based its determination on the totality of the scope and content of the prior art, including the Swift-Pauly use, and on its finding as to the level of ordinary skill in that art.

Before reaching its conclusion of obviousness, the District Court made certain findings of fact as to the level of skill in the pertinent art at the time the Podlesak alleged

invention was made. Findings of fact from the District Court's decision supporting lack of invention are set forth in Appendix D hereto. Based upon such findings the District Court concluded that the Podlesak patent was invalid and had not satisfied the requirement of non-obviousness of Section 103 of Title 35, U. S. C. After determining the scope and content of the prior art, and evaluating the differences between that art and the Podlesak claims as shown by the evidence, the District Court made the following findings in regard to the level of ordinary skill in the prior art:

> "Modifications of the Swift-Pauly process to permit efficient backflow of gases as in Podlesak by formation of a complete rather than interrupted transverse seal; by longitudinally sealing at a point allowing for enclosure of a plurality of units within a sealed tube having an open end; by location of release of the gas downstream of the plurality of units; and by removal of obstructions impeding the backflow of gas within the tube were simple functional expedients within the skill of any mechanic seeking to improve the force of the flow of atmosphere in the particular environment." (A-17, D-4.)

On appeal by National Dairy, the United States Court of Appeals for the Seventh Circuit reversed the District Court on the issue of validity and made certain statements of "fact" to justify this reversal, contrary to or in conflict with findings of the District Court, which "facts" did not apply to the level of ordinary skill in the prior art but were completely related to the Swift-Pauly use.

In its opinion, the Court of Appeals stated:

> "We agree with both the district judge's description of the prior art and his enumeration of the differances between that art and the Podlesak method. We disagree, however, that 'any mechanic' skilled in the art, even after viewing the Swift-Pauly operation in all its aspects, would readily recognize the modifica-

tions in that operation necessary to achieve Podlesak, thereby rendering the latter method obvious." (B-5.)

The last sentence quoted is a clear rejection of the District Court's findings on the level of the art quoted above, and quoted in the opinion just prior to its rejection. This constituted a setting aside of a finding supported by the evidence. These "facts" which the Court of Appeals found and relied on are found on Appendix pages B-5-8 and are discussed at pages 13-17 of this petition.

REASONS FOR GRANTING WRIT.

(1) The Court of Appeals erred in reversing the District Court on the issue of the validity of the Podlesak patent by failing to apply properly the mandate of this Court in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966), and the requirements of Section 103.

The *Graham* case requires as the test of patentability under Section 103 an inquiry into three questions of fact, namely:

(1) a determination of the scope and content of the prior art,

(2) an evaluation of the differences between the prior art and the claims at issue,

(3) applying and determining the level of the ordinary skill in the art.

After these questions of fact are found, obviousness or non-obviousness as a question of law is determined. (383 U. S. at p. 17.) Obviousness or non-obviousness as a question of law can not be determined by the court without first having made the proper preliminary factual inquiry and findings.

In the instant case, the District Court properly followed the teachings of this Court in its approach to the determination of the issue of obviousness. This was recognized by the Court of Appeals, which said:

> "In arriving at his conclusion of obviousness, the district judge followed the teachings of *Graham* v. *John Deere Co. of Kansas City, Mo.*, 383 U. S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966)." (B-3.)

The District Court properly determined the scope and content of the prior art, evaluated the difference between the prior art and the claims of the Podlesak patent at issue, and applied and determined the level of ordinary skill in the art. It considered the entire prior art in evidence and not solely the Swift-Pauly use, in determining the level of skill in that art. Against the background of such factual findings, the District Court properly concluded that the Podlesak patent was invalid as being obvious under Section 103.

The opinion of the Court of Appeals betrays a confusion of reasoning which led to its error.

The Court of Appeals first pointed out (B-5) that "the district judge resolved 'The level of ordinary skill in the pertinent art' ", as the *Graham* case required him to do. The Court of Appeals clearly recognized that the District Court found that the modifications over the prior art "to reach Podlesak 'were simple functional expedients within the skill of any mechanic seeking to improve the force of the flow of atmosphere in the particular environment' ". (B-5.)

Immediately after its summary above of the three findings, the Court of Appeals expressed its agreement with the first two, but added that: "We disagree, however, that 'any mechanic' skilled in the art . . . would recognize the modifications in that operation necessary to achieve Podlesak, thereby rendering the latter method obvious." (B-5.)

The Court of Appeals in this passage appeared to recognize that it was disagreeing with the District Court on a question of fact, and was in effect substituting a finding of its own for the finding of the district judge.

But there are other passages which suggest that the Court of Appeals actually thought that it was disagreeing with the District Court only on the ultimate legal *conclusion* of obviousness to be drawn from the facts found. Thus in the passage next to be quoted, the Court of Appeals suggested that no attack was being made on the findings, but that the attack was upon "the judge's conclusion that the method of the patent in suit as a whole was obvious":

> "The essential facts relating to the issue of validity are incorporated in an able and exhaustive opinion written by the district judge. No attack in this appeal is made with respect to those findings. Plaintiffs urge the incorrectness of the judge's conclusion that the method of the patent in suit as a whole was obvious to a person having ordinary skill in the art at the time the invention was made in 1954. Likewise, our only disagreement with the district judge's decision centers on his resolution of the issue of obviousness." (B-3.)

This entire passage suggests that the Court of Appeals was here treating its decision as a disagreement with the District Court only as to the ultimate conclusion that the invention was obvious—a question of law and not of fact. We submit that what the Court of Appeals really did was to attack the specific findings of fact which would have compelled the legal conclusion of obviousness.

But even if the Court of Appeals had disagreed solely on the legal issue of obviousness, and accepted all the District Court's finding as to the level of ordinary skill in the prior art, it could do so only by disregarding the facts found and by relying on other, and irrelevant "facts". If this is what the Court of Appeals thought it was doing, it applied an erroneous standard and betrayed a complete misconception of the legal test of obviousness as laid down in Section 103 and explained in the decisions of this Court.

The error of the Court of Appeals was that it regarded the failure of the Swift-Pauly process to anticipate Pod-

lesak as evidence of lack of obviousness. This is made clear by the following passage in the opinion:

> "The very fact that those in charge of Swift-Pauly operations, all of whom were skilled and experienced in the art, did not after four years of work, develop the Podlesak method *is strong evidence* that the invention was not obvious". (B-5; Emphasis supplied.)

If the failure of the Swift-Pauly work to constitute an "anticipation" under Section 102 is "strong evidence" of lack of obviousness, then Section 103 in effect adds nothing to the law. If Section 103 is to have any independent validity, then the mere fact that an invention has not been anticipated by a prior use can not constitute controlling evidence of lack of obviousness.

The Court of Appeals attempts to bolster its conclusion by the finding below that the Swift-Pauly operations, in practicing the gas-flushing operation claimed in Podlesak, "practiced unwittingly without the realization that it could be used" for the purposes for which Podlesak is used. But this finding of the District Court was the precise basis for the holding of non-anticipation!

The reason why the Swift-Pauly operations did not lead to a complete anticipation of Podlesak was covered by findings which the Court of Appeals ignored. The District Court found:

> "A combination of the basic continuous packaging process as in Campbell and the gas-flushing principle taught by Ingle is found in the Swift-Pauly operation." (A-15, D-2.)

This follows a finding that the "various steps of the method of the Podlesak patent, singly and in combination, were old in the crowded packaging art". (A-14, D-3.) The District Court recognized that "the combination of Campbell and Ingle as shown in the Swift-Pauly operation" would have constituted complete anticipation of Podlesak except for the fact that

> "the methods of Swift-Pauly and of Ingle as well as the Campbell patent are addressed to a basically different packaging concept from that of Podlesak". (A-15, D-3.)

In other words, as the District Court findings go on to make clear, the Swift-Pauly operation was seeking a different finished package, a package in which the gas had been exhausted, as opposed to a package in which the gas was retained. (A-15, 16, D-3.)

Thus the very reason why Swift-Pauly did not anticipate Podlesak explains why Swift-Pauly did not lead to Podlesak. But this has nothing whatever to do with the question whether Podlesak was obvious to any one who set out to make a gas-filled package.

It is clear that, in reaching its conclusion of lack of obviousness, the Court of Appeals erred, whether the error consisted in a violation of Rule 52(a), or whether the error consisted in a misconception of the distinction between the defense of anticipation under Section 102 and the defense of obviousness under Section 103.

Whether the people at Swift-Pauly realized the full significance of all of the potential of the gas-flushing which resulted from the collapsing of one end of the tube of packaging material after the insertion of gas (A-12) is of no consequence under the decisions of this Court, in determining whether the Podlesak method had been anticipated by Swift-Pauly or was obvious in view of all the prior art as determined through the inquiries to be made under Section 103. *General Electric Co.* v. *Jewel Incandescent Lamp Co.*, 326 U. S. 242, 249 (1945).

The District Court properly found, based upon its inquiry into the level of ordinary skill considering all of the pertinent art, not just the use at Swift-Pauly, that to get to Podlesak from Swift-Pauly, required "simple functional expedients within the skill of any mechanic seeking to im-

prove the force of the flow of atmosphere in the particular environment." (A-17, D-4.)

The Court of Appeals, contrary to the requirements of Section 103 and the teachings of this Court, even if the restraints of Rule 52(a) are ignored, did not determine and apply the level of ordinary skill in the prior art as the District Court had, but viewed the Swift-Pauly operations alone in attempting to determine validity of the Podlesak patent under Section 103.

The Court of Appeals, in reversing the District Court's determination of the issue of validity in this instance, not only violated the requirements under Section 103 and the teachings of this Court, but petitioners submit, made the same error that it criticized the same District Court for having made in *Toro Manufacturing Corp.* v. *Jacobson Mfg. Co.*, 357 F. 2d 901, 902-3 (7th Cir. 1966), in that "[t]he court equated the test for 'obviousness' with that employed to determine 'anticipation' and [i]n so doing the court applied an improper standard of invention."

(2) The Court of Appeals erred in reversing the District Court on the issue of validity, violating Federal Rule of Civil Procedure 52(a) and departing from the prescribed standards of judicial review by:

(a) Rejecting the District Court's fully supported finding of fact on the level of ordinary skill in the prior art and ignoring the findings of fact on the scope and content of that art.

Although the Court of Appeals initially stated in its decision that:

> "[O]ur only disagreement with the district judge's decision centers on his resolution of the issue of obviousness" (B-3),

it later rejected the District Court's finding of fact on the level of ordinary skill in the prior art, stating:

> "We agree with both the district judge's description of the prior art and his enumeration of the differences between that art and the Podlesak method. We disagree, however, that 'any mechanic' skilled in the art, even after viewing the Swift-Pauly operation in all its aspects would readily recognize the modifications in that operation necessary to achieve Podlesak, thereby rendering the latter method obvious." (B-5.)

Determining and applying the level of ordinary skill in the prior art was a factual determination by the District Court based upon the evidence before it. Under the requirements of Rule 52 (a), findings by the District Court cannot be set aside on appeal unless they are clearly erroneous. As this Court stated in *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 495-496 (1950):

> "But we can not say that the District Court was 'clearly erroneous' in finding that the National Association and Nelson were not laced into the conspiracy to fix the commissions in the District of Columbia."
>
> • • • • •
>
> "It is not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the District Court apparently deemed innocent [Citing cases]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

The findings of fact of the District Court were supported by the evidence and were not clearly erroneous. These findings supported the District Court's conclusion of invalidity under Section 103 on the grounds that the Podlesak method was obvious. Since these factual determinations can not, under Rule 52(a), be changed or distinguished by the Court of Appeals, that Court was in error in its reversal of the District Court. The determination and application of the level of ordinary skill in the

prior art by the District Court must stand since it is supported by the record. Whether the Court of Appeals "disagreed" with that finding or would have given the facts some other construction should have no significance in its determination of the appeal. This is emphasized by the fact that the Court of Appeals in its "disagreement" dealt only with the Swift-Pauly use, as prior art, to determine the level of ordinary skill therein, and not with the entire scope and content of the prior art as considered by the District Court.

Similarly the Court of Appeals erred by:

(b) Substituting certain "facts" for opposite critical findings of fact which were made by the District Court and fully supported by the evidence.

Even if the Court of Appeals had not rejected any of the District Court's findings of fact, but merely disagreed with the conclusion the District Court drew therefrom, the conclusion reached by the Court of Appeals would be error since it relied in support thereof on additional "facts" which are not material to the issue of obviousness and bear solely on the Swift-Pauly use. These "facts" are not consistent with the inquiry this Court has stated in the *Graham* case to be necessary.

The additional "facts" recited by the Court of Appeals as justification of the reversal are set forth in italics to distinguish them from the comments and discussion which follow:

"The very fact that those in charge of Swift-Pauly operations, all of whom were skilled and experienced in the art, did not after four years of work, develop the Podlesak method is strong evidence that the invention was not obvious." (B-5.)

The District Court found that overcoming the basic difference between the prior art of Swift-Pauly and the

method claimed by the Podlesak patent by eliminating the final atmosphere exhaustion of the package lay in the simple step dictated by the objective of the packaging process, that is whether the atmosphere was to be retained or exhausted from the individual sealed section. (A-17, 18, D-4.) This is an example of the Court of Appeals attempting to determine obviousness based on the Swift-Pauly use alone as if determining anticipation, and not, as did the District Court, on the scope and content of all of the prior art and the determined level of ordinary skill therein.

"[T]he Swift-Pauly work with gas, embodied in the combination of the Ingle and Campbell teachings, was finally abandoned sometime in 1954." (B-6.)

This implied that the Swift-Pauly use had little utility. Contrary to this the District Court, consistent with *Corona Co.* v. *Dovan Corp.*, 276 U. S. 358 (1928), found as fact that abandonment of the Swift-Pauly gas flushing aspects of the cheese wrapping operation was not relevant to the question of validity. (A-18.)

Swift-Pauly later started packaging cheese using an antimycotic (I. 321). The use of antimycotics had not been approved generally in the packaging of cheese. Approval came shortly before Swift-Pauly decided to use this type of packaging of process cheese.

"Despite the knowledge and skill of the Swift-Pauly workers, their experiments led them away from the Podlesak method." (B-6.)

This statement by the Court of Appeals was inaccurate and not supported as fact in the record. The Swift-Pauly people were not "led away" from the gas packaging. They found that once the use of an antimycotic had been generally approved for the industry, it permitted an easier, more satisfactory packaging method for process cheese. (A-13.)

"[S]hortly before the Swift-Pauly work with gas was abandoned, its researchers concluded that 'CO₂ content is of little importance in mold inhibition.'" (B-6.)

This assertion is not accurate and is misleading when considered in the context of the record. The opinion of the District Court included the following finding on the research project:

> "Operating instructions for the Swift-Pauly packaging process during the years 1951 and 1952 reveal this notation:
>
> > 'The production of sliced cheese with proper shelf life and freedom from mold depends upon two main factors (a) the production of the interleaved slices with as nearly zero mold contamination as possible and (b) the packaging of the slices with carbon dioxide and high vacuum in a package with good seals.'
>
> While the Swift-Pauly operation was being carried out in Green Bay, Wisconsin, employees of Swift & Co. conducted a research project relating to the development of a method for packaging cuts of cheese under vacuum in a transparent, wax-coated cellophane material with the intention of achieving an improved shelf life of the product. Persons conducting the research project observed in July 1951 that all of the test data on keeping qualities of the cheese showed 'fairly conclusively that the use of CO_2 does increase the shelf-life of our cheese.' In October 1953, on the basis of tests performed in the production project, it was observed that 'CO_2 content is of little importance in mold inhibition,' and '[A]pparently the success of mold inhibition by reduction of the available O_2 depends on the development of a leakproof package.'" (A-12, 13.)

The Court of Appeals' statement concerning the little importance of the CO_2 content must be considered in connection with the conclusion that the ultimate success of mold

inhibition in the process depended upon the development of a leakproof package. Petitioners submit that the District Court so recognized. The CO_2 content would have little importance if the package was not leakproof and permitted oxygen to enter. The people at Swift-Pauly realized, as did the District Court, that if the oxygen could be replaced by CO_2 this would prevent mold growth if an air tight package was available. (A-13, 16.) Even Dr. J. B. Stine, National Dairy's employee and witness at the trial testified that even though you can never eliminate mold, he had known since his college days that you could stop the growth of mold by eliminating or displacing oxygen with carbon dioxide or nitrogen gas. (III. 1182-3.)

"But such an unwitting prior use does not evidence obviousness in a later invention; in fact it indicates just the opposite." (B-6.)

The Court of Appeals was referring to the Swift-Pauly project as an "unwitting prior use" and apparently derived this from a statement contained in the District Court's opinion regarding gas flushing being "practiced unwittingly." The Swift-Pauly use was not found by the District Court to be an unwitting prior use. The Swift-Pauly packaging process was practiced with full knowledge of the desired results and the effect that it had on mold inhibition. Even if the Swift-Pauly people had not realized the full import of their development, it would not detract from its application in this case. *General Electric Co.* v. *Jewel Incandescent Lamp Co.*, 326 U. S. 242, 249 (1945). Contrary to the approach taken by the Court of Appeals, the District Court did not limit its inquiry into the scope and content of the prior art and the level of ordinary skill therein to the Swift-Pauly use but also properly and necessarily included consideration of the gas packaging teachings of Maxfield, Ingle, and others and based its finding of the

level of ordinary skill in the pertinent prior art on the totality of that art.

"The worth of the Podlesak method is further indicated by its arrogation by many other cheese packagers in competition with Kraft. Such arrogation can hardly comport with a finding of obviousness." (B-8.)

There is no evidence in the record that the Podlesak method was "arrogated" by any other cheese packagers let alone by the defendants in this action. The issues of yalidity and infringement were severed and the trial proceeded *solely* on the issue of validity. There was no proof of infringement in the record and such proof could not have been material to the issue of the validity of the patent. In order for the Court of Appeals to so state in its opinion it would have had to assume that the defendants were using gas packaging methods which read on the claims of the Podlesak patent; it would have had to assume infringement *before* the issue was tried.

The foregoing "facts" were relied upon by the Court of Appeals to justify its reversal of the District Court's decision. These "facts" are not supported by the evidence or the District Court's findings of fact. To the extent they conflict with the uncontested and supported findings of fact of the District Court they were not proper under Rule 52(a) and were improperly used by the Court of Appeals to attempt to justify reversal. These "facts" also fail since they do not represent the type of factual inquiry required in determining whether Section 103 has been satisfied, whether the alleged invention was obvious.

CONCLUSION.

To have the question of patent validity determined according to uniform decisions of this Court is important not only to petitioners, the other litigants in the cases now pending in the Eastern and Western Districts of Wisconsin, but also to the entire cheese packaging industry, considering the paramount position of National Dairy in such industry.

For this reason and the other reasons discussed in detail above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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